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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 78

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF J. H. WOODWARD.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 42–49) is not officially reported. The opinion of the Circuit Court of Appeals (R. 66) is reported in 63 F. (2d) 621.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 17, 1933. (R. 68–69.) The petition for a writ of certiorari was filed May 17, 1933, and was granted May 29, 1933. The jurisdiction of this Court rests on Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to claim as a deduction, in computing the net income of the trust, amounts which are distributed to the testator's widow, who elected to take an interest in the trust created by the will in lieu of her dower and statutory interest in the testator's estate.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra* pp. 5–6.

STATEMENT

The facts found by the Board of Tax Appeals (R. 42–49) may be summarized as follows:

The respondent is trustee under the will of J. H. Woodward who died a resident of Alabama on December 15, 1917. (R. 42.) The will provided that the residuary estate should be held in trust and the net income therefrom, after payment of a small monthly annuity to a named beneficiary, should be paid as and when received to the testator's widow and his three children or their survivors in equal shares. (R. 43.) The will provided for the disposition of the corpus of the trust after the death of the surviving life tenant. (R. 44.) The widow did not dissent from the provision made for her by the will. (R. 45.)

The net income was distributed currently to the widow and three children in accordance with the

terms of the will. (R. 45.) The income thus distributed to the widow during and prior to the taxable years was less than the amount of her statutory interest in the decedent's estate. (R. 45–46.) In her tax returns from 1919 to 1927 the widow reported amounts thus distributed to her and paid income taxes thereon. (R. 47.) Subsequent to the decision of the Circuit Court of Appeals for the First Circuit in *United States* v. *Bolster*, 26 F. (2d) 760, and after the death of the widow, the Commissioner refunded the taxes thus paid, with interest. (R. 48.)

In its return of the income of the trust, the respondent deducted the amounts distributed to the widow. The Commissioner disallowed this deduction and determined deficiencies accordingly. The Board of Tax Appeals approved the action of the Commissioner. This decision was reversed by the court below.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions to the widow, in pursuance of her election, were distributions of income as such rather than returns of capital.

2. The Circuit Court of Appeals erred in deciding that the amounts distributed by the respondent to the widow, in pursuance of the terms of the testamentary trust, were deductible by the trustee.

3. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

ARGUMENT

This case presents the precise question involved in *Commissioner* v. *Butterworth,* pending before this Court as No. 75, October Term, 1933. The Court is respectfully referred to the argument and authorities presented in the Government's brief in that case.

As has been pointed out in Point III of the *Butterworth* brief, the reasoning of the court below in the present case is different from that of the Circuit Court of Appeals for the Third Circuit. The court below apparently adopts the view that the income received by the widow is taxable to her, from which it follows that the payments made to her by the trustee may be deducted in the trustee's return. We submit that this conclusion is correct. Our only contention is that if the widow is not taxable, the trustee may not deduct the payments made to her.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed, unless it be concluded that the income in question is taxable in full to the widow.

Respectfully submitted.

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OCTOBER 1933.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *.

* * * * *

(b) Except as otherwise provided * * * the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *. (U.S.C., Title 26, Sec. 960.)

Section 219 (U.S.C.App., Title 26, Sec. 960) of the Revenue Act of 1926, c. 27, 44 Stat. 9, is identical with Section 219 of the Revenue Act of 1924, *supra*. Section 161 (a) (2) of the Revenue Act of 1928, c. 852, 45 Stat. 791, is identical with Section 219 of the Revenue Acts of 1924 and 1926. Section 162 (b) of the Revenue Act of 1928 repeats, without material change, the provisions of Section 219 (b) (2) of the earlier Acts.

The Code of Alabama of 1907, Secs. 6168 and 6169 (brought forward as Secs. 10593 and 10594, Code of Alabama of 1923) provides:

> 6168. *Dissent by widow; her rights on; when dissent unnecessary.*—The widow may, in all cases, dissent from the will of her deceased husband, and, in lieu of the provision made for her by such will, take her dower in the lands and such portion of the personal estate as she would have been entitled to in case of intestacy. * * *
>
> 6169. *Dissent; when to be made.*—Such dissent must be made in writing, and deposited, within twelve months from the probate of the will, with the judge of probate of the county in which the will is probated; and an entry must be made of record, specifying the day on which the dissent was made.

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